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EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12 Street, S.W., TW-A325
Washington, DC 20554

Re: Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Colorado Payphone Association Petition for Reconsideration Re: Retroactive Adjustment of Second Report and Order Period Compensation; Retroactive Adjustment of Interim Compensation

Dear Ms. Dortch:

AT&T Corp., Sprint Corporation, and WorldCom, Inc. respectfully submit this *ex parte* response to various *ex parte* submissions by the American Public Communications Council's ("APCC's") in this docket.[1]

As detailed below, the Commission's decision in *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 2545, ¶ 196 (1999) ("*Third Report & Order*") to require refunds of overpayments made for the period between October 7, 1997 and April 21, 1999 (the "Intermediate Period") is entirely in keeping with the D.C. Circuit's decision that remanded this issue for further consideration. *See MCI Telecommunications Corp.* v. *FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) ("*MCI Remand Decision*"); *Third Report & Order*, 14 FCC Rcd. at ¶¶ 195-96. APCC's claim

[1] *See* Letter from Robert F. Aldrich to Marlene H. Dortch dated May 23, 2002, "Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128" ("APCC's *May 23d Ex Parte*"); Letter from Robert F. Aldrich to Marlene H. Dortch dated April 25, 2002, "Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996" ("APCC's April 25, 2002 *Ex Parte* Submission"); Letter from Albert H. Kramer and Robert F. Aldrich to William F. Caton, Acting Secretary, dated April 15, 2002, "Re: Early Period (1992-96) Compensation" ("APCC's *Early Period Submission*"); Letter from Albert H. Kramer and Robert F. Aldrich to William F. Caton, Acting Secretary, dated April 15, 2002, Re: Standards for Granting Retroactive True Ups ("APCC's *True Up Standards Submission*").

that it should be entitled to keep these overpayments misreads the *MCI Remand Decision* and provides no legitimate basis for reconsideration.

A full and fair reading of the *MCI Remand Decision* makes clear that, on remand, the Commission was authorized – indeed, was expected by the D.C. Circuit – to order the refund of any overpayments for the Intermediate Period that resulted from the Commission's previous establishment of an erroneous per call rate. *See* 143 F.3d at 609. The Commission properly concluded that its adjustment of the per call rate should apply for the entire Intermediate Period. *See Third Report & Order*, ¶¶ 196-97. Indeed, that conclusion is further supported by Section 276 of the Act and general legal principles governing refund orders by agencies, both of which authorized the Commission's order of refunds for the Intermediate Period.

APCC's claim that it should be permitted to keep overpayments for the Intermediate Period because it allegedly was underpaid for calls made years earlier – *i.e.*, between June 2, 1992 and November 6, 1996 (the "Early Period") – is without merit. The Commission long ago ruled that APCC was not entitled to additional compensation for the Early Period. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 11 FCC Rcd 20541, ¶ 126 (1996) ("*Report & Order*"). That determination was left undisturbed on appeal, *see Illinois Public Telecommunications Ass'n* v. *FCC*, 117 F.3d 555 (D.C. Cir.), *on motion for clarification or rehearing*, 123 F.3d 693 (1997), and is controlling in this case. Moreover, any effort by APCC, years after the fact, to seek additional compensation (directly or indirectly) for the Early Period would require the Commission to engage in impermissible retroactive ratemaking. And, in all events, APCC's arguments regarding the Early Period involve layer upon layer of assumptions that are wholly speculative.

I. THE COMMISSION PROPERLY ORDERED THAT OVERPAYMENTS MADE DURING THE INTERMEDIATE PERIOD SHOULD BE REFUNDED.

The Commission properly implemented the *MCI Remand Decision* by requiring that overpayments made during the Intermediate Period be refunded.

A. The *MCI Remand Decision* Fully Supports The Commission's Decision To Refund Overpayments For The Intermediate Period.

The predicate for the Commission's decision to order the refund of overpayments was the *MCI Remand Decision*, in which the D.C. Circuit held that that the Commission's explanation for its "derivation of the $.284 rate" for calls made during the Intermediate Period was "plainly inadequate." 143 F.3d at 608. The court of appeals refrained from vacating the Commission's existing rate (as it had in the first payphone appeal) because "vacating the order would leave payphone service providers all but uncompensated for coinless calls made from their payphones, and disrupt the business plans they have made on the basis of their expectation of compensation." *Id.* On the other hand, the decision not to vacate the existing $.284 rate would not result in unfair prejudice to IXCs, because the court of appeals expressed its

> clear understanding that if and when on remand the Commission establishes some different rate of fair compensation for coinless payphone calls, the Commission may order payphone service providers to refund to their customers any excess charges for coinless calls collected pursuant to the current rate.

Id. In doing so, the court relied on the Commission's acknowledgment that "it has the authority to adjust the compensation rate retroactively 'should the equities so dictate,'" *id.*, and the Commission's "authority to order refunds where overcompensation has occurred," *id.*

B. On Remand, The Commission Properly Concluded That Overpayments For The Intermediate Period Should Be Refunded.

On remand, the Commission concluded that its prior rate of compensation – *i.e.*, the $.284 per call rate – was too high and instead adopted a reduced per call rate of $.238 for the Intermediate Period. *Third Report & Order* ¶¶ 14, 196. This new rate was affirmed by the D.C. Circuit. *See American Pub. Comms. Council* v. *FCC*, 215 F.3d 51, 58 (D.C. 2000). After correcting its erroneous rate, the Commission relied on the *MCI Remand Decision*, noting that the court of appeals, in

> deciding to remand, rather than vacate, the [Commission's $.284 per call rate] . . . explained that its decision was based, in part, on *"the clear understanding that if and when on remand the Commission establishes some different rate of fair compensation for coinless payphone calls, the Commission may order payphone service providers to refund to their customers any excess charges for coinless calls collected pursuant to the current [$.284] rate."*

Third Report & Order ¶ 195 (quoting 143 F.3d at 609) (emphasis added). Because it had the authority to order the refund of overpayments under "section 4(i) of the Act" and § 276, the Commission concluded that the $.238 per call rate "should apply . . . retroactively to the period between October 7, 1997 and the effective date of this Order [April 1999]. *Id.* ¶¶ 195, 196.

In short, the Commission's decision to order refunds of overpayments for the Intermediate Period properly implemented the mandate of the *MCI Remand Decision*.

II. THE COMMISSION'S ORDER REQUIRING REFUNDS OF OVERPAYMENTS PROPERLY IMPLEMENTS THE STATUTORY SCHEME.

The Commission's decision ordering refunds of overpayments made during the Intermediate Period also properly implements the requirements of 47 U.S.C. § 276.

A. Section 276 Authorizes The Commission To Order Refunds For The Intermediate Period.

Although APCC concedes that the issue of refunds "must be guided by Congress's directive in Section 276 of the Act," *APCC's Early Period Submission* at 9, its subsequent arguments ignore that the Commission's order requiring refunds of overpayments for the Intermediate Period was issued pursuant to the specific authority granted by Section 276 of the 1996 Telecommunications Act. Section 276 provides, in relevant part:

> [W]ithin 9 months after February 8, 1996, the Commission *shall* take all actions necessary (including any reconsideration) to prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed interstate and intrastate call using their payphone.

47 U.S.C. § 276(b)(1). On remand from the D.C. Circuit, the Commission recognized that § 276 "directed" it to "'insure fair compensation'" for payphone calls. *Third Report & Order* ¶ 195.

Although APCC pays lip service to the requirements of Section 276, APCC's *True Up Standards Submission* wholly ignores that statute in discussing the appropriate standards for granting refunds of overpayments made during the Intermediate Period. *See id.* at 1-13. Specifically, APCC argues that refunds should be granted only if the Commission concludes that an "'unjust enrichment' standard for granting post-remand refunds" has been satisfied, *id.* at 2,[2] and that the Commission must assess compensation issues not only for the period governed by Section 276, but also for a four-year period *before* Section 276 was enacted or took effect, *id.* (arguing that propriety of refunds for the Intermediate Period must include assessment of "legal errors committed by the Commission" for the "Early Period (June 1, 1992 – November 6, 1996)").

Section 276, by its terms, required the Commission to implement its mandates *after* the Early Period ended. *See* 47 U.S.C. § 276(b)(1) (permitting Commission until "9 months

[2] APCC suggests in this regard that it would be inequitable to allow IXCs to recoup their overpayments in the Intermediate Period because they have not made refunds to customers who had been charged a surcharge reflecting the higher rate later found unlawful. Aside from the elemental fact that the IXCs have not yet been able to recoup their overpayments – and hence would have had no sound business basis for making refunds to customers up to now -- the Commission's policy in analogous cases is not to require flow-through of refunds by nondominant IXCs, particularly where, as here, the IXCs' rates were themselves not subject to an investigation and accounting order, and the amounts due to particular customers would be small in relation to the administrative burden of attempting to make a refund. *See Communications Satellite Corporation*, 4 FCC Rcd 8514, 8515-16 (1989). Allowing PSPs to retain the excess compensation paid them by IXCs would clearly unjustly enrich them, since the amount they initially received has been held to have been unreasonably high, and they have been on notice for more than three years that they would have to disgorge this excess.

after February 8, 1996 . . . to prescribe regulations"). The Commission, in turn, concluded that its regulations implementing Section 276 would *not* apply to periods before the effective date of its *Report & Order*. 11 FCC Rcd. 20541, ¶ 126 (1996) (declining "to require that per-call compensation be paid retroactive to the date of release of the *Notice*" on June 6, 1996). That aspect of the Commission's Order was left undisturbed on appeal, and is controlling here. Indeed, APCC's contrary position – that the Commission's authority under Section 276 to order refunds for the Intermediate Period *requires* the Commission to assess compensation paid during the four-year period *prior* to the enactment of Section 276 – is utterly implausible.

B. APCC's Contrary Legal Arguments Mischaracterize General Law Regarding Refunds.

Not surprisingly, APCC looks elsewhere to support its position that it is entitled to keep the overpayments that it received for calls made during the Intermediate Period. *See APCC's True Up Standards Submission* at 5-13 (relying upon *Moss* v. *Civil Aeronautics Board*, 521 F.2d 298, 314 (D.C. Cir. 1975)). But an analysis of general principles governing agency refunds directly supports the Commission's decision to order refunds of overpayments for the Intermediate Period.

Contrary to APCC's claim that "a refund presumption is particularly disfavored where an agency has affirmatively approved or prescribed a rate but the rate order has been remanded by the court of appeals," *APCC's True Up Standards Submission* at 4, the propriety of an agency exercising its discretion to order a refund is *greatest* when: (i) it covers the period during which litigation over the rates was occurring, such that the parties had full notice of the possible impropriety of the rate and no grounds for relying on it, and (ii) the need for the refund is caused by agency error that has been judicially corrected on appeal – both of which apply here.

For example, in *Exxon Co.* v. *FERC*, 182 F.2d 30 (D.C. Cir. 1999), a case upon which APCC purports to rely,[3] the court of appeals held that an agency had abused its discretion when it refused retroactively to apply a proper valuation rate for allocating certain monetary credits *after* the court had found the prior method improper. *Id.* at 49. The court explained, first, that all parties had been "on notice" that the valuation rates "were contested," particularly given that they had participated in all proceedings. *Id.* As a result, "[a]ny reliance that may have been placed on the rates in light of these proceedings was unwarranted." *Id.* Second, the court emphasized that "'when the Commission commits legal error, the *proper* remedy is one that puts the parties in the position they would have been in *had the error not been made*.'" *Id.* (emphasis added).[4]

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[3] *See* APCC's *True Up Standards* at 4 n.4. Notably, APCC's quotation from that case is not from the court's decision, but rather from its recitation of arguments by the party whose position was *rejected* in that case. 182 F.3d at 49.

[4] *See also, e.g.*, *Verizon Tel. Cos.* v. *FCC*, 269 F.3d 1098, 1110-12 (D.C. Cir. 2001) (upholding retroactive application of rate where (1) rates "were under unceasing challenge," making any reliance unreasonable, and (2) agency was "correct[ing] its own legal mistakes" after they had "been highlighted by the federal judiciary"); *Public Serv. Co. of Colo.* v. *FERC*, 91 F.3d 1478,

Under these standards, the Commission's order requiring refunds of overpayments for the Intermediate Period was entirely proper. First, the Commission's rates were obviously "under unceasing challenge," *Verizon*, 269 F.3d at 1110, and any reliance on them by APCC would not have been reasonable. Two months after the Intermediate Period began, the Commission itself "place[d] the industry on notice" of the possible need to order refunds. *See Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, Part I, CC Docket No. 96-128 (Aug. 5, 1997) (cited in *MCI Remand Decision*, 143 F.3d at 609). The Commission informed the industry that "compensation levels paid or received under our existing rules pending action on remand may be subject to retroactive adjustment . . . to undo the effects of applying aspects of the current rules that were identified by the court as potentially arbitrary." *Id.* Second, it would defeat the purposes of appellate review if the IXCs, after successfully challenging the Commission's errors in setting the $.284 rate, were nevertheless obligated to abide by that erroneous rate. *See Verizon*, 269 F.3d at 1111 (rejecting as a "mockery of the error-correcting function of appellate review" the argument that retroactive rate correction would be improper). Finally, the Commission has held that the original rate applied during the Intermediate Period was substantively improper, and therefore it failed to provide the "fair compensation" required by § 276.

The cases on which APCC relies do not alter this conclusion. First, most do not involve a legal error by the agency in setting or approving the rates at issue, but instead involve the propriety of agency remedies for errors of private parties, such as tariff violations.[5] Second, in the remaining cases, including APCC's primary case, *Moss*, 521 F.2d at 298, the prior rates, although legally erroneous in some procedural way, were not ruled substantively improper under the governing statute. Indeed, *Moss* itself involved a prior rate that, although procedurally improper, *id.* at 301, was not found by the agency to have been unjust and unreasonable.[6]

1490 (D.C. Cir. 1996) (reversing denial of refund for period after rate "was expressly drawn into question" by filing of petition with Commission because "we do not see how the Commission could possibly find that the producers reasonably relied upon continuing to recover it"); *cf. Western Resources, Inc.* v. *FERC*, 72 F.3d 147, 151 (D.C. Cir. 1995) (explaining that, when prior rate is improperly low because of agency error, "the presence of the court challenge may adequately notify customers" of likely invalidity of rate and make permissible a subsequent, higher, rate).

[5] *See, e.g.*, *Las Cruces TV Cable* v. *FCC*, 645 F.2d 1041, 1042-43 (D.C. Cir. 1981) (affirming, in relevant part, Commission decision to award refund of payments made under rates that Commission had found to be not just and reasonable); *Wisconsin Elec. Power Co.* v. *FERC*, 602 F.2d 452, 454 (D.C. Cir. 1978) (affirming FERC decision to order refund of rates that it had found to be improperly high); *Koch Gateway Pipeline Co.* v. *FERC*, 136 F.3d 810, 811-12 (D.C. Cir. 1998) (reversing FERC decision to order refund after FERC had found that company violated its tariff); *Towns of Concord* v. *FERC*, 955 F.2d 67, 68 (D.C. Cir. 1992) (affirming FERC decision not to order refund of certain charges imposed by a private party that FERC concluded were improper).

[6] *See also Consumer Fed'n of Am.* v. *FPC*, 515 F.2d 347, 359 (D.C. Cir. 1975) ("While full refund under an invalid order is a sound basic rule, it may be offset, at least in part, by . . . [inter

Here, on remand, the Commission concluded that its prior $.284 per call rate for the Intermediate Period was substantively improper and that a lower $.238 per call rate was warranted for the entire Intermediate Period. *Third Report & Order*, ¶ 196. That conclusion is consistent not only with the requirements of Section 276, but also with general principles governing the propriety of agency refunds after a substantive agency error is challenged on appeal and corrected on remand.

III. APCC'S ARGUMENTS REGARDING ADDITIONAL COMPENSATION FOR THE "EARLY PERIOD" ARE MERITLESS.

APCC's related claim that refunds for the Intermediate Period should be offset by an amount that APCC now – years later – claims it was undercompensated during the Early Period also should be rejected.

A. APCC's Arguments Regarding The "Early Period" Are Legally Meritless.

As a legal matter, compensation received during the Early Period is irrelevant to determining whether refunds of overpayments from the Intermediate Period were appropriate because the Commission already has properly and conclusively resolved the question of additional compensation for the Early Period.

1. APCC Was Never Entitled To Additional Early Period Compensation.

Contrary to its principal argument, APCC was never entitled to additional Early Period compensation. Specifically, APCC contends that "the compensation provision of Section 226(e)(2) of the Act clearly encompassed subscriber 800 calls" – for which APCC claims that it was under compensated – and that the D.C. Circuit's decision in *Florida Public Telecommunications Ass'n, Inc. v. FCC*, 54 F.3d 857 (D.C. Cir. 1995) ("*FTPA*"), provides that "independent PSPs were improperly denied compensation for subscriber 800 calls for a total of approximately 53 months, from June 1, 1992 through November 6, 1996." *APCC Early Period Submission* at 3-4. This argument ignores the language of Section 226(e)(2) and badly misconstrues the D.C. Circuit's *FTPA* decision.

Section 226(e)(2) did not mandate compensation or create an entitlement to compensation for subscriber-800 calls made during the Early Period. Rather, that statute stated only that the Commission "consider the need to prescribe compensation . . . for calls routed to routers of operator services . . . ." 47 U.S.C. § 226(e)(2) (emphasis added). The D.C. Circuit's decision in *FTPA* confirms that understanding. Although the *FTPA* court concluded that the Commission had improperly ruled that subscriber-800 calls fell outside the requirements of Section 226, it did not require the Commission to order compensation for such calls. Rather, the *FTPA* court quoted the language of Section 226(e)(2) when it remanded the case to the Commission "to 'consider the need to prescribe compensation from consideration' for

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alia] the fact that some portion of the increased prices paid may be discerned as consistent with just and reasonable . . . rates").

subscriber-800 calls." 54 F.3d at 862 (quoting § 226(e)(2)). The *FTPA* decision makes this point expressly:

> Section 226(e)(2) *does not* order the FCC to prescribe compensation for all the calls to which it refers, only to 'consider the need' to prescribe compensation. The Commission may decide that some important policy consideration justifies prescribing compensation only for calls that Congress ordered unblocked . . . .

Id. at 862 (emphasis added). Thus, neither Section 226(e)(2) nor the *FTPA* decision entitled APCC to additional Early Period compensation.

2. The Commission Has Already Concluded That No Additional Early Period Compensation Was Warranted.

On remand from the *FTPA* decision, the Commission decided not to provide additional compensation for the Early Period. In particular, the Commission expressly folded the *FTPA* remand into its proceeding to implement § 276 of the Telecommunications Act of 1996. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 6716, ¶¶ 12 n.42, 88 (1996). APCC's comments filed with the Commission make clear that it understood that the *FTPA* remand issues would be so resolved in conjunction with the Commission's implementation of § 276 of the 1996 Act. Indeed, APCC asked only:

> that the Commission take a modest step to recognize independent PSPs' entitlement to compensation under *FTPA* by making the interim compensation in this proceeding retroactive to at least to the Public Notice initiating this proceeding [*i.e.*, June 6, 1996].

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Petition of the Colorado Payphone Ass'n for Partial Reconsideration, at 21-22 (Apr. 21, 1999) (quoting APCC's comments). Thus, in 1996, APCC expressly recognized that the remand of the issues from the *FTPA* decision would be resolved in conjunction with the Commission's proceeding implementing § 276 of the 1996, but APCC chose to make no serious claim for additional Early Period compensation.

Not surprisingly, the Commission rejected APCC's "modest" request to make the compensation retroactive to June 6, 1996, specifically declining to apply its ruling back "to the date of release of the Notice." *Report & Order* ¶ 126. It therefore made clear that APCC would receive *no* additional Early Period compensation. To the extent that APCC disagreed with that result, it should have raised that issue on appeal and insisted that this issue be addressed by the D.C. Circuit. APCC did not raise this issue, and the Commission's determination on this point was left undisturbed on appeal. *See generally Illinois Public Telecommunications Ass'n*, 117 F.3d 555. APCC cannot now, more than half a decade after the fact, relitigate this point, because "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument" in later proceedings. *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470

(D.C. Cir. 1989). This rule "prevents the 'bizarre result' that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who has argued and lost.'" *Id.* (internal citations omitted) (quoting *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1982)).[7]

3. An Early Period Offset Would Constitute Impermissible Retroactive Ratemaking.

Because the Commission's determination that there would be no additional Early Period compensation was left undisturbed on appeal, APCC's belated request for additional compensation for that period (through an offset) would require the Commission to engage in illegal retroactive ratemaking. The law is settled that once an agency has conclusively established a rate – and that determination is upheld or goes unchallenged on appeal – the agency may not later retroactively revise that rate, including through an order for "ex post reparations." *Verizon*, 269 F.3d at 1107-08.[8] Put another way, once judicial review of a rate – or the possibility of such review – has concluded, retroactive revision of that rate is improper. Or, as the D.C. Circuit recently explained, "[s]hould an agency declare a rate to be lawful . . . , refunds are thereafter impermissible as a form of retroactive ratemaking." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002).

These principles apply directly here to prohibit ratemaking that would permit retroactive credits that would constitute additional Early Period compensation. In its Report & Order following the *FTPA* remand, the Commission, by declining to apply its ratemaking decision back to the Early Period, thereby concluded that additional Early Period compensation was unwarranted. *See* Report & Order ¶¶ 117-126. When that determination was left undisturbed on appeal, *see generally* 117 F.3d at 558, the possibility of further judicial review of the Commission's ruling ended. *See Northwestern Indiana Tel. Co.*, 872 F.2d at 470. When the possibility of further review was exhausted – over five years ago – the lawful rate for the Early Period was conclusively established and any legal doubt about the rates for the Early Period – and thus any possible notice to IXCs that the rates might change – also ended. Accordingly, any effort now to accede to APCC's belated requests for additional compensation for that period would clearly constitute illegal retroactive ratemaking.

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[7] *See also NRDC* v. *Thomas*, 838 F.2d 1224, 1235 (D.C. Cir. 1988) (claim preclusion "bars relitigation not only as to all matters which were determined in the previous litigation, but also as to all matters that might have been determined"); *Outward Continental N. Pac. Freight Conf.* v. *FMC*, 385 F.2d 981, 982-82 n.3 (D.C. Cir. 1967) ("those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance").

[8] *Cf. Western Resources*, 72 F.3d at 151 (explaining that if "a judicial decision invalidates a key element of [an agency's] approach, the presence of the court challenge may adequately notify customers, for purposes of . . . the rule against retroactive ratemaking" of the need for remedial action).

B. APCC's Factual Arguments Regarding the Early Period Are Unsupported and Speculative.

In all events, APCC's factual arguments regarding its claim of undercompensation during the Early Period are based on layer upon layer of unsupported speculation. *APCC's Early Period Submission* at 5-9. Specifically, to reach its conclusion that "PSPs should have received approximately $82 million in additional compensation during the Early Period," APCC argues that it has adopted "conservative assumptions." *Id.* at 5, 7. Indeed, now APCC contends that the shortfall for the Early Period was more than $135 million. APCC's *May 23d Ex Parte* at 9. But these so-called "conservative assumptions" are based upon layers and layers of speculation, including the following: (1) speculation regarding the number of compensable calls for the end of the Early Period, APCC's *Early Period Submission* at 5; (2) speculation regarding the percentage of these "compensable" calls that were interstate calls, *id.* at 6; (3) speculation regarding the average number of interstate access code calls, *id.* at 6; (4) speculation regarding the ratio of interstate 800 calls to interstate access calls to subscriber 800 calls during the Early Period, *id.*; and (5) an unsupported assumption of a linear rate of growth of calls during the Early Period, *id.* In the end, of course, all this speculation is entirely irrelevant because, as demonstrated above, APCC was not entitled to additional compensation for the Early Period.

CONCLUSION

For these reasons, AT&T respectfully submits that the APCC's request that it be permitted to keep overpayments from IXCs for the Intermediate Period should be rejected.

Sincerely,

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